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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HELEN L. QUAN et al.,

Plaintiffs and Appellants,

v.

NATIVIDAD DELGADO,

Defendant and Respondent.

B185190

(Los Angeles County  
Super. Ct. No. BC301166)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andria K. Richey, Judge. Reversed and remanded with direction.

Kasai Law Group, Wayne T. Kasai and Kristin Snow Reynolds for Plaintiffs and Appellants.

Law Offices of Thomas Swallow and Thomas Swallow for Defendant and Respondent.

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A borrower, claiming the lender demanded more than the amount due under a promissory note, sued for breach of contract. The lender's demurrer was sustained without leave to amend and the borrower appeals. We reverse.<sup>1</sup>

## **FACTS**

### **A.**

Helen L. Quan and Nelson W. Quan owned real property on Vineland Avenue in Baldwin Park and operated a gas station located on an adjacent leased lot on Francisquito Avenue. In 1999, as the first step in their plan to rebuild and expand the gas station and with the assistance of Sheena Gray, a real estate broker, the Quans borrowed \$400,000 from Natividad Delgado (Gray's elderly mother) to use for the purchase of the Francisquito Avenue real property. Helen Quan executed a promissory note obligating her to pay interest only (17 percent per annum) in monthly installments of \$5,666.67 from July 7, 1999 to July 7, 2000, with the principal due on or before July 7, 2000. The note was secured by deeds of trust on both the Vineland and Francisquito properties (the latter having been purchased in reliance on Gray's promise that she could arrange a \$3.6 million construction loan for the Quans).

Although the Quans were not able to obtain the construction loan, they made the interest payments due on the Delgado note, only to have Delgado (acting through Gray) unilaterally increase the interest rate to 24 percent and refuse to credit the Quans' account for all the payments they made. In April

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<sup>1</sup> We issued our opinion in this case on March 28, 2007, affirming the judgment in its entirety. We then granted the appellants' petition for rehearing, reconsidered the issues raised on appeal, and now issue this opinion reversing the judgment in its entirety. We apologize to the parties for the delay this has caused in the ultimate resolution of this dispute and note the error was ours, not theirs.

2002, the Quans tendered the amount due (\$151,208.87) but Delgado refused to accept it, threatened foreclosure of the deeds of trust, and demanded \$5,500 in cash to stop the foreclosure process.

**B.**

In August 2003, the Quans sued Gray and Delgado for fraud and breach of contract, seeking damages as well as declaratory and injunctive relief (Gray is not a party to this appeal). The Quans sought pendente lite orders to stop a foreclosure sale then set for September 23, and in their supporting declarations explained that their accountant calculated the balance due on the note (based on the correct interest rate and with credit for the Quans' payments as established by cancelled checks) as \$151,208.87, which they had tendered to Delgado but which she refused and demanded \$320,847.89. Gray and Delgado opposed the application, with Gray claiming that money was owed to her for her commission earned on the sale of the Francisquito property and Delgado claiming the Quans had defaulted on their payment obligations under the note.

The trial court (Hon. Robert O'Brien) stayed the foreclosure sale and issued an order to show cause re preliminary injunction, with the hearing set for October 8 (and later continued). On October 30, the trial court (Hon. David Yaffe) denied the Quans' application for a preliminary injunction, finding that although the Quans established that they had paid \$473,342 to Delgado, Delgado's evidence established that only \$426,173 had been received. In short, the court (ignoring the claim that Delgado had increased the interest rate from 17 to 24 percent) refused to stop the sale because of a \$47,000 difference in the tender.

On October 27, Gray and Delgado answered the Quans' complaint and Gray (but not Delgado) cross-complained against Helen Quan, alleging causes of action for conversion (fine jewelry borrowed by Quan but not returned), to recover money loaned (\$14,000) and money due for the unpaid balance on goods sold (\$63,500 for jewelry), and breach of contract (failure to pay \$21,000 for the commission due on the sale of the Francisquito property).

The foreclosure sale was reset for November 13, 2003. On November 12, the Quans again applied for pendente lite relief, explaining that they had increased their tender to include the disputed \$47,000 but that it had once again been refused. Gray and Delgado opposed the application and the trial court (Hon. Elizabeth Grimes) denied the application for a temporary restraining order and refused to issue an order to show cause.

### C.

With the trial court's permission, the Quans filed a first amended complaint in January 2004, to which Gray and Delgado demurred. Over the Quans' opposition, the trial court (Hon. Andria K. Richey) sustained the demurrer with leave to amend. In March, the Quans filed their second amended complaint alleging various claims against Gray (fraud, negligent misrepresentation, concealment, and conversion) and a single cause of action against Delgado (breach of contract based on the promissory note). The breach of contract cause of action is straightforward -- alleging that Helen Quan tendered all the amounts due under the note, that Delgado (having raised the interest rate and failed to credit all of the Quans' payments) refused the tender, and that (in order to prevent the foreclosure) the Quans thereafter paid the full amount claimed by Delgado, thereby suffering damages.

Gray and Delgado again demurred, contending with regard to the breach of contract cause of action against Delgado that the promissory note is not a contract or that, if it is, that it cannot be enforced by Quan, only by Delgado. The Quans opposed the demurrer, pointing out with regard to the breach of contract cause of action that their second amended complaint alleged all the elements of a breach of contract action and that no more was required. On April 26, 2004, the trial court sustained, without leave to amend, the demurrers to all but the fifth cause of action against Gray (conversion), thereby disposing of the Quans' breach of contract claim against Delgado. Although there were no remaining claims by or against Delgado, no order or judgment of dismissal was entered at that time -- but Delgado did file a motion for an order determining that she was the prevailing party and thus entitled to her attorney's fees of \$85,394.75. Quan opposed the motion.

While the fee motion was pending, the Quans' fifth cause of action against Gray, and Gray's cross-complaint against Helen Quan were tried to a jury, which returned its verdict in favor of Helen Quan on the Quans' conversion claim (for which they awarded \$30,000 payable by Gray), and in favor of Helen Quan on all of the claims in Gray's cross-complaint.

On the same day the jury returned its verdict in favor of the Quans and against Gray, the trial court granted Delgado's motion for attorney's fees in the reduced amount of \$52,000.

The Quans appeal from the June 13, 2005 judgment thereafter entered in favor of Delgado.<sup>2</sup>

## DISCUSSION

The Quans contend their breach of contract cause of action against Delgado states a viable cause of action and that Delgado's demurrer should therefore have been overruled. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38 [demurrer must be overruled if the complaint states a cause of action on any theory].) We agree.

The breach of contract cause of action alleges the terms of the promissory note -- date (July 1999), amount (\$400,000), interest rate (17 percent per annum), payments (interest only payable monthly for a year, with the balance due in July 2000) -- that it was in writing and signed by Helen Quan, payable to Delgado, that the consideration for Quans' obligation was Delgado's loan of \$400,000 to Quan for the purchase of the Francisquito property, and that the note was secured by deeds of trust on the adjoining parcels of real property. It follows that all the elements of a contract were alleged. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

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<sup>2</sup> As noted above, no order of dismissal was filed at the time Delgado's demurrer was sustained without leave to amend. (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4.) Similarly, there was no mention of Delgado in the judgment on the jury's verdict against Gray. In fact, the only judgment that concluded the case as to Delgado is the judgment entered on June 13, 2005 (notice of entry of that judgment was given on June 15, 2005). It follows that the notice of appeal, filed August 5, 2005, was timely (and that Delgado's contention to the contrary lacks merit). (Code Civ. Proc., § 904.1, subd. (a)(2); Cal. Rules of Court, rule 8.104(a)(2) [notice of appeal filed within 60 days after service of notice of entry of judgment is timely].)

The breach of contract cause of action also alleges that Delgado breached the contract by refusing to accept Helen Quan's tender of the full amount due under the note and, instead, demanding an amount calculated on a higher interest rate (24 percent) and without regard to some of the payments made by Quan -- and that, as a result, the Quans were damaged because they had to pay more than the amount due in order to stop the foreclosure sale initiated by Delgado. It follows that all the elements of a breach of contract cause of action were alleged. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 383 [the plaintiff must plead the existence of a contract, its terms, the occurrence of any conditions precedent to enforcement, and the breach of the agreement]; *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385 [a tender properly made has the effect of putting the lender in default if she refuses to accept it].)

It matters not that the contract is unilateral (as are most promissory notes). (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 107, pp. 149-150.) As a practical matter, the only difference between a bilateral contract and a unilateral contract is that the latter may be revoked by the offeror before it is accepted or partially performed by the offeree (*id.*, §§ 166-167, pp. 202-204), an issue that is moot where, as here, Delgado's offer to loan \$400,000 to Helen Quan was accepted and (even by Delgado's view) at least partially performed by Quan (who gave Delgado the required deeds of trust and paid all but \$47,000 of the amount due before the first foreclosure sale was scheduled). (Com. Code, § 3603; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1444; cf. *FPI Development, Inc. v. Nakashima*, *supra*, 231 Cal.App.3d at p. 383 [in an action on a note, the allegation of execution of the note alleges the existence of a contract]; *Ridgley v. Topa Thrift & Loan Assn.*

(1998) 17 Cal.4th 970, 975 [an example of an action by a borrower against the lender after the disputed amounts had been paid by the borrower].)

Similarly, it matters not that the Quans alleged the terms of the note rather than attaching a copy to their second amended complaint. Aside from the fact that the note was attached to the prior pleadings, it is sufficient that its material terms were alleged and that a prima facie right to relief was shown. (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199 [in an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language].)

We summarily reject Delgado's remaining claims, all of which are specious. She says the orders denying the Quans' applications for pendente lite relief are "res judicata" to Helen Quan's breach of contract cause of action, but (not surprisingly) offers no relevant authority (only *sui generis* dependency cases). She says the demurrer was properly sustained because the complaint's allegations are not truthful, thus ignoring the fundamental standard of appellate review that requires us to presume the truth of all well pleaded facts when a case has been disposed of by demurrer. (*Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 38.) She says the demurrer was properly sustained simply because the earlier demurrers were sustained, apparently on the theory that one error justifies another (an argument we necessarily rejected by our decision to grant rehearing in this case).

Finally, we dispose of the attorney fee order on the ground that our reversal of the judgment means Delgado was not the prevailing party and,



therefore, not entitled to her attorney's fees. It follows that we necessarily deny Delgado's request for sanctions for a frivolous appeal.

### **DISPOSITION**

The June 13, 2005 judgment is reversed in its entirety, and the cause is remanded to the trial court with directions (1) to direct Delgado to answer the Quans' breach of contract cause of action and (2) to set the matter for trial. Delgado's request for sanctions is denied. The Quans are awarded their costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

ROTHSCHILD, J.